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No. 08-808

Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF TEXAS,

Petitioner

v.

LARRY O'NEAL HALEY,

Respondent

On Petition for Writ of Certiorari to the Court of Appeals of Texas, Fifth District

BRIEF IN OPPOSITION

William R. Barr
Counsel of Record
P.O. Box 595153
Dallas, Texas 75359
(214) 417-4961

Counsel for Respondent

QUESTIONS PRESENTED

The Petitioner's "Questions Presented" are factually inaccurate, erroneously suggesting circumstances in which a criminal defense attorney "knows" that his client has admitted the "truth" of the allegations against him and is prohibited by a state professional rule of conduct from ". . . defend[ing] a proceeding, or . . . controvert[ing] an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous"; and is, therefore, relieved from the duty to conduct any independent investigation.

Considering the opinion below, more accurate statements of the questions presented would be:

Would a defense attorney's refusal to conduct any independent investigation of (1) the facts of a case set for trial and (2) the mitigation facts of his client's mental disabilities not constitute ineffective assistance because the attorney believed that the client had "substantially" admitted the offense and a state rule of professional responsibility dictates that he not defend a proceeding or controvert an issue that he reasonably believes is frivolous?

Is an accused's guilty plea rendered involuntary by his counsel's failure to do any investigation beyond a review of the prosecution file when the accused has insisted on trial?

Does an accused's "vague admission" that does not include the specifics in the indictment constitute "truth" (or a "reasonable basis") such that the criminal defense attorney is relieved of his duty to make an independent investigation?

CORPORATE DISCLOSURE STATEMENT

Neither party is a nongovernmental corporation; therefore, no corporate disclosure statement is required in this case. Sup. Ct. R. 29.6 (West 2008)

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REASONS FOR DENYING THE WRIT

I. The Petitioner has misstated essential facts in this case, including whether the Respondent admitted the "truth" of the criminal charges against him. The supposed "admission" (referred to by the Petitioner as "the truth") was debunked by both the trial court and the state court of appeals as "vague." Petitioner further omits or misstates numerous other facts that change the factual context for the writ.

II. Even assuming the validity of Petitioner's assumption that Respondent had admitted the "truth," Petitioner's citations to precedents of this Court are not supportive of his argument that an admission (or confession) coupled with a state rule of professional conduct that proscribes an attorney's ". . . defend[ing] a proceeding, . . . controvert[ing] an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous" excuses counsel's complete failure to investigate.

I. Misstatements of Facts

The Missing Facts

Petitioner has failed to present a reasonable factual context of this case. This Court has emphasized the importance of the facts in relation to the legal question:

> The requirement ... tends to assure that the legal questions presented to the court will be resolved not in the rarified atmosphere of a

> debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.
>
> *Valley Forge Christian Academy v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)

Petitioner begins his recitation of the facts with Respondent pleading guilty (P:2) but fails to include the fact that Respondent had been set for trial two times over the course of the previous 21 months and that he told his trial counsel that he wanted to set the case for trial from the outset of his representation. (O: Also missing was the fact that counsel "did no independent investigation." (*see* O:*6/ P:22)

Respondent's trial counsel was unable to recall (or find in his file) any visits with Respondent in the jail to contradict Respondent's complaint that counsel had seen him only one time besides the initial interview. (MNT:26) Counsel had previously testified in the hearing that he "[t]alked with [Respondent] on *numerous* occasions through all of these twists and turns about what his position was as related to what the little girl was saying happened." (MNT:24) [emphasis added]

Also not included in Petitioner's recitation of the facts was the undisputed evidence that Respondent suffered from bipolar disorder, mild mental retardation, and polysubstance abuse. (MNT:15)

In Petitioner's Appendix I: The Opinion Below (P: 18), the Fifth District Court of Appeals summarized

Respondent's affidavit with the motion for new trial:

> In his affidavit attached to the motion for new trial, [Respondent] stated that he first met with his attorney in December 2005 after counsel was initially appointed. [Respondent] did not see his attorney again until March 2007 when the case was set for trial (for the third time). [Respondent] stated he had written to his attorney fourteen times, but the only correspondence he had received from his attorney were two letters concerning trial settings and one letter informing him of a plea bargain offer. [Respondent] had informed his attorney of certain mental difficulties and had asked for a psychiatric evaluation. According to Haley, his attorney had never talked to him about the facts of the case and had never asked about his "witnesses." Haley stated that he decided to plead guilty because he knew the case was set for trial and his attorney had done no preparation. (O:*4/P:20-1)

Petitioner suggests that counsel had stated that "he had made punishment-related issues the focus of his investigations because of his client's admissions and the consistency of his client's and the victim's versions of the criminative facts." (P:3) The record merely reflects that counsel stated, "[T]here were no factual disputes about what the little girl was saying happened and that she -- she was consistent. I never -- there was not a hint of inconsistency that I was ever aware of from any source --" (MNT:16) Counsel

states that he was comparing what the alleged victim said "happened at the offense with, of course, what [Respondent] is telling me that happened" (MNT:18), but counsel never offers his specific conclusions from the comparison. The third page of the motion hearing cited by Petitioner only presents the contradicted position that he had "talked with [Respondent] on *numerous* occasions...." [*see supra*]

A Vague "Admission" is Not the "Truth"

Suggesting that Respondent's trial counsel testified "repeatedly" that Respondent had "admitted perpetrating the crime," Petitioner disguises the fact that there was only one vague "admission" in a letter (undated) allegedly from Respondent. The Petitioner states that "[Respondent]'s counsel repeatedly testified that [Respondent] had admitted having perpetrated the crime upon the 10-year-old victim" citing four places in the reporter's record for the motion for new trial hearing. (P:3) These instances were indeed Respondent's *trial counsel* repeatedly saying that Respondent had admitted to him that what the child had said was true, but when pressed, trial counsel had no specific evidence of an admission except for a vague statement in a letter, evaluated by the Texas Fifth District Court of Appeals:

> In a letter to his attorney, [Respondent] admitted committing certain behavior suggesting his guilt for the charged conduct. However, [Respondent] did not recall committing the specific allegations in the indictment. Moreover, the record shows [Respondent] suffered from mental illness and was mildly mentally retarded, yet

> counsel did nothing to obtain an evaluation of [Respondent] or even subpoena hismedical records. The trial court could have determined, under the totality of the circumstances presented here, it was not reasonable for trial counsel to have relied on [Respondent]'s vague admissions in deciding to perform no independent investigation. (O:*6-7/P:22)

In the hearing on the motion for new trial, the State's contention that Respondent had admitted to the offense occasioned the trial court to respond that she had heard no admission by Respondent "except that he was so wasted[,] he doesn't remember what happened." (MNT:45)

Respondent's trial counsel also stated that he had "talked with the [Respondent] on numerous occasions" (MNT:24) but was unable to pin point the dates of these conversations or offer any refutation of Respondent's claim that trial counsel had only seen him one time after the initial interview, despite the case being set for trial three times over the course of 21 months. (MNT:26)

Failure to Investigate Respondent's Documented Diagnoses of BiPolar Disorder and Mental Retardation

Petitioner suggested in his argument that Respondent's trial counsel had "made punishment-related issues the focus of his investigation because of his client's admissions and the consistency of the criminative facts." (P:3) However, in the hearing on the motion for new trial, when asked if he thought putting a document that listed Respondent's diagnoses into evidence was "sufficient," counsel

stated that he felt the diagnoses were "not in dispute" (MNT:30) and that they didn't "need any development at all [by a professional]" (MNT:31) and that it was "[his] decision not to have that -- that additional work done." (MNT:40)

Counsel had known that Respondent had these diagnoses "early on" (MNT:31), that Respondent had sent him documentation of his diagnoses (MNT:32) which he had returned to Respondent without making copies for his records. (MNT:12) When asked in cross-examination whether "as an officer of the court" counsel felt that "[Respondent] was competent to stand trial," he answered, "Yes. I thought [Respondent] was entirely competent to stand trial." (MNT:38) Previously in the hearing, counsel had explained why he had not requested a competency examination of Respondent: "In terms of competency to stand trial, *in my opinion*, he was entirely competent to stand trial." (MNT:14) [emphasis added] Counsel also detailed why he had not submitted a request to determine if Respondent had been insane at the time of the alleged incident:

> He was at one time claiming he was insane at the time of the offense. It was clear to me that he was not insane at the time of the offense nor there was any -- any evidence, in my opinion, that showed he was insane at the time of the offense. (MNT:14)

The court of appeals noted his failure to perform any investigation on these matters:

> There is evidence that [Respondent] had been hospitalized for mental illness and

> suffers from severe depression, polysubstance dependence, and is mildly mentally retarded. [Respondent] at one point told his attorney he was not sane at the time of the offense, but counsel independently determined [Respondent] was both sane and competent at the time of the offense. However, it does not appear counsel performed any independent investigation to make this determination. Although counsel was aware [Respondent] had been treated at MHMR, he did not request any information from MHMR. (O:*5-6;P:21)

The trial court in its findings of fact and conclusions of law, found counsel's "failure to conduct any independent investigation, failure to investigate the child's credibility, failure to investigate [Respondent's] mental disorders and overall failure to subject the State's case to any adversarial testing constituted ineffective assistance." (O:*6; P:22)

The state court of appeals held that "[Respondent] stated in his affidavit that he only pleaded guilty because his trial attorney performed no investigation. The circumstances of [Respondent]'s plea support his assertion. The trial court was free to believe [Respondent]." (O:*7-8; P:22-3)

II. Petitioner's cited precedents are inapplicable to these facts

In *Nix v. Whiteside*[2], the issue was whether counsel was ineffective for refusing to assist an

[2] 475 U.S. 157 (1986)

accused offer perjured testimony. In that case, this Court explained

> In *Strickland*, we recognized counsel's duty of loyalty and his "overarching duty to advocate the defendant's cause." *Ibid.* Plainly, that duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. *Nix. at* 166

There was no suggestion in this case that Respondent ever suggested he was intending on offering perjured testimony or "otherwise violating the law." Contrary to the record of Respondent's counsel's failures to investigate, the counsel for Nix began his investigation as soon as he was appointed. *See Nix at* 160. Here, investigating the complaining witness's records with Child Protective Services was "legitimate, lawful conduct," and *Nix* holds Respondent's counsel obligated to "take all reasonable lawful means to attain the objectives of the client" short of "assisting the client in presenting false evidence or otherwise violating the law." *Id. at* 166

> In his affidavit attached to the motion for new trial, [Respondent] stated that he first met with his attorney in December 2005 after counsel was initially appointed. [Respondent] did not see his attorney again until March 2007 when the case was set for trial (for the third time). [Respondent] stated he had written to his attorney fourteen times, but the only correspondence he had

received from his attorney were two letters concerning trial settings and one letter informing him of a plea bargain offer. [Respondent] had informed his attorney of certain mental difficulties and had asked for a psychiatric evaluation. According to [Respondent], his attorney had never talked to him about the facts of the case and had never asked about his "witnesses." [Respondent] stated that he decided to plead guilty because he knew the case was set for trial and his attorney had done no preparation. (O:*4/P:20-1)

Ethical Duties

While Petitioner focuses on trial counsel's purported duty under Texas Rules of Professional Conduct not to "bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous." TEX. DISCIPLINARY R.PROF.CONDUCT 3.01, he fails to consider the rules of conduct more specifically tailored to criminal defense. In *Williams v. Taylor*[1], this Court cited to the ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 DUTY TO INVESTIGATE:

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction, The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of

> the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

The *Williams* opinion keeps the focus on the reasonableness of the attorney's "tactical" decisions as to not investigating despite the attorney's obligation to conduct a thorough investigation of the defendant's background." *Williams at* 396. In this case, counsel's decision not to further investigate was because he believed that the court would "know what to do with it."

CONCLUSION

Petitioner's assumption that Respondent admitted the charges against him contradicts the record. The Texas Fifth District Court of Appeals regarded the statement counsel read from an undated letter to be to be less than an admission of the offense, finding that "[Respondent] did not recall committing the specific allegations in the indictment." (O:*7/P:22) Both the trial court and the state court of appeals described the statement as less than convincing. (MNT:45; O:*7/P:22)

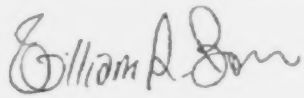
Without the premise that Respondent specifically and completely confessed to the alleged offense (the "truth"), Petitioner has no basis for the invocation of the Texas Rule of Professional Conduct prohibiting counsel from defending a proceeding that the lawyer "reasonably believes" is "frivolous." Save the vague statements in the undated, alleged letter from Respondent, Petitioner's arguments about the quantum and sufficiency of Respondent's alleged

admission are entirely the unsubstantiated assertions of Respondent's counsel.

To grant this petition would open the door to any criminal defense attorney who has failed to make reasonable, independent investigation of a case to be exempted from his duty to his client by merely asserting that "My client admitted everything to me. He's guilty, so I had no duty to do any investigation of his case."

For the foregoing reasons, this Court should deny the State of Texas's Petition for Writ of Certiorari.

Respectfully submitted,



William R. Barr
Counsel of Record
P.O. Box 595153
Dallas, Texas 75359
(214) 417-4961
beezecorp@earthlink.net

Counsel for Respondent
Larry O'Neal Haley